IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1859 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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POPATLAL GOKALDAS SHAH

Versus

AHMEDABAD MUNICIPAL CORP.

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Appearance:

1. First Appeal No. 1859 of 2001

MR CJ VIN for Petitioner No. 1-2

MR HS MUNSHAW for Respondent No. 1

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CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: / /2002

C.A.V. JUDGEMENT

1. Popatlal Gokaldas Shah and others, appellants original plaintiffs have filed this First Appeal under Section 96 of the Code of Civil Procedure against the judgment and decree dated 29th October, 1999, passed by the learned City Civil Judge, Ahmedabad, in Civil Suit

No.6387 of 1987. The learned Judge by his impugned judgment has held that plaintiffs proved that deceased Jayeshkumar received injuries resulting into death while taking bath in the swimming pool on account of negligence of the defendant-Corporation in maintaining the swimming pool. The plaintiffs are entitled to compensation. However, the learned Judge has held that the Corporation has been able to prove that the suit is not maintainable in view of provisions of Sec.487 of the Bombay Provincial Municipal Corporations Act (hereinafter referred to as `the Act'). The learned Judge further held that even if sec.487 of the Act is not applicable as per Article 72 of the Limitation Act, 1963, the incident took place on 12.2.84 and suit in question was filed on 21.8.86 and therefore the suit is barred by period of limitation for claiming compensation and thereby dismissed the suit.

2. The facts giving rise to this appeal are as under:-

2.1 It is the case of the plaintiff that deceased Jayeshbhai aged about 21 years was their son. The plaintiff No.1 is the father of Jayeshbhai and plaintiff No.2 - Sushilaben is the mother of the deceased Jayeshbhai. It is the case of the plaintiff that defendant Ahmedabad Municipal Corporation constituted under the provisions of the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as `the Act'). As per the provisions of the Act, the Municipality has to function certain obligatory statutory duty which is provided under Sec.65 of the Act and certain discretionary duty provided under Sec.66 of the Act. It is contended that the Corporation is maintaining the swimming pool at Bapunagar known as Lal Bahadur Stadium swimming pool.

2.2 It is the case of the plaintiffs that deceased Jayeshbhai went for swimming at the Bapunagar Swimming Pool at Bapunagar on 12.2.84 at about 8.30 a.m. For the purpose of swimming he has taken dive but at that time he met with an accident and he became serious. From there he was taken to Shardaben Hospital and ultimately he died on the way to hospital and he was declared dead in the hospital.

2.3 It is the case of the plaintiffs that, when plaintiffs met with an accident, the coach of the swimming pool has not taken proper protection and care by giving immediate help. The Corporation also did not provide medical aid also. So deceased Jayesh succumbed to the injury and ultimately died.

2.4 It is the plaintiffs' case that deceased was earning Rs.600/- per month at the time of accident by repairing scooters. The deceased was unmarried person therefore he could have contributed 2/3rd of his income to the plaintiffs out of Rs.600/- p.m. i.e. Rs.400/p.m. The deceased was aged 21 years at the time of the accident. Thus the total dependency loss comes to Rs.76,800/- and Rs.3200/- compensation towards expectation of life. Thus, plaintiffs suffered a loss of Rs.80,000/- in view of the death of the deceased. The plaintiffs also issued notice dated 16th February, 1985 (Exh.37) to the Corporation and ultimately filed suit on 21st August, 1986.

2.5 The defendant filed written statement at Exh.12. In the written statement the Corporation made following submissions:

2.6 It was submitted that to maintain the swimming pool is discretionary duty under Sec.66 of the Act, and the defendant having acted with bonafide intention and good faith, its action is immuned from being challenged under sec.487 of the Act. It was submitted that the cause of action arose in favour of the plaintiffs on 12.2.84 when the deceased Jayesh died allegedly in the swimming pool, the suit having been filed after the prescribed time under sec.487 is barred by limitation and hence the suit deserves to be dismissed on the ground of limitation.

2.7 As regards factual aspect, it was contended that deceased was negligent in taking dive and, therefore, the corporation is not liable for the same. It was submitted that the Corporation has taken enough care to save the deceased, a coach was their who has also helped the deceased from taking out from the swimming pool. The deceased thereafter was sent to the hospital but ultimately the deceased died at the hospital. It was further contended that the Corporation was not responsible or not negligent in performing the discretionary duty in this behalf.

2.8 Before the trial court, on behalf of the deceased, plaintiff has produced post-mortem report dated 12.2.84 which is at Exh.35, copy of the notice dated 16.1.85 at Ex.37. The post-mortem report shows that the deceased died because of asphyxial death due to drowning. It was also establish on record that the deceased was born on 6.12.62 and he expired on 12.2.84 that means he was aged about 21/22 years at the time of incident. The

plaintiffs have also produced death certificate (Exh. 36) as well as school leaving certificate in this behalf.

2.9 As regards oral evidence, plaintiff father Popatlal Gokaldas Shah was examined at Ex.34. He stated that Jayesh is his son and he went to swimming pool on 12.2.84 and ultimately he died because of drowning. He was declared death as soon as he entered in the hospital. Shri Vinodbhai Karsanbhai Sagar, neighbour of plaintiff was also examined at Exh.42 in this behalf. He was also present in the swimming pool. He states that there is no negligence on the part of the deceased. He also states that about the incident he informed the instructor who changed his clothes and came into the swimming pool and they both helped the deceased out of the water. It is testified that the coach was not present at the swimming pool at the relevant point of time. Thereafter the deceased was made to lie down out of the swimming pool but his respiratory system was not working. Thereafter he went to inform the father of the deceased about the incident and came back with deceased father at the swimming pool again. The father of the deceased Popatbhai was made to sit in the office and after 10 minutes ambulance arrived in which the deceased was taken to Shardaben Hospital.

2.10 When the matter was heard by learned City Civil Judge, Ahmedabad, the learned Judge after considering the evidence on record, held that the instructor being informed regarding the accident did not take it seriously and did not sense urgency but merely changed his clothes and had a swimming costume and had wasted the precious life saving time. The learned Judge has held that the person who has drowned in the water need most immediately and urgent help and that the time consumed by the instructor for changing the clothes and putting up swimming costume probably might have proved fatal. He further observed that it transpires from the testimony of this witness that after about 10 minutes of his coming back after informing the plaintiff ambulance arrived. Here it is to be appreciated that defendant wasted the valuable time of atleast about 15 to 20 minutes time in not making available the medical treatment to the deceased immediately.

2.11 The learned Judge also held that a prudent man would not have waited for the ambulance to arrive when a person is fighting for life. It has been further held by the learned Judge that had the defendant acted sensibly. they could have sensed urgency and could have hired even a private vehicle for making immediately help available

to the deceased. They have not acted wisely. Unfortunately such a timely and prompt efforts were missing in this case. This factor also shows that there was sheer negligence on the part of the defendant in trying to save the deceased. The learned Judge also held that, even if a discretionary duty is performed by the defendant the same is required to be performed with due concern and diligence. The act of not providing a favourable help to the deceased cannot be said to a bonafide act so as to confer immunity upon the persons named under Sec.487. It is also felicious to contend that since providing a swimming pool is a discretionary duty, no statutory duty was cast towards the plaintiff, the breach of which has given rise to the action for damages because of direct default of the defendant.

2.12 The learned Judge further held that it is obvious that the damage complained of has a direct result of default committed by the defendant. The learned Judge further held that the instructor did not kept a constant guard to avoid the incident. It is wrong to contend that the presence of the coach or the instructor is not required when the trained persons are swimming in the swimming pool or that he cannot keep a constant vigil on all swimmers because the accident may occur to even trained swimmer and at that time it becomes the duty of the coach or the instructor to immediately save the victim and it is the duty of a instructor to keep a watchfulness on the swimming pool.

2.13 As regards income of deceased, the learned Judge has held that deceased was earning Rs.600/- p.m. So if 2/3rd contributed his income i.e. Rs.400/- p.m. and as he aged about 21 years at the time of accident, therefore multiplier of 16 was taken. Thus the total dependency loss comes to Rs.76,800/and Rs.3200/- for compensation towards expectation of life. Thus Rs.80,000/- was determined as compensation.

2.14 However as regards limitation, the learned Judge held that defendant is entitled to succeed on the ground that the suit is barred by limitation under Sec.487 of the Act inasmuch as the action complained of alleged negligence is not brought within the period of six months next after accrual of cause of action i.e. 12.2.84 though it is brought after the expiration of one month next after statutory notice dated 16.1.85 Ex.37. In fact statutory notice Exh.37 is given by the plaintiffs to the defendant after 11 months of the accrual of the cause of action.

2.15 The learned Judge has also alternatively held that, even if it is assumed that Sec.487 of the Act will not apply in the present case, then also the suit is barred under Article 72 of the Limitation Act, 1963 because the action for compensation for doing of or omitting to do the alleged act etc. has to be brought within the period of one year of such act or omission. In the present case, the action is brought after a period of 2 years six months and 9 days after alleged omission on the part of the defendant and, therefore, also the suit of the plaintiff is liable to be dismissed.

3. Mr.C.J.Vin, learned advocate appeared on behalf of the appellants-plaintiff submitted that, as regards negligence and compensation, the findings of the learned Judge is in favour of the plaintiff, and as the Corporation has not filed appeal he is not addressing the Court in this aspect.

4. As regards findings of Limitation Act, he submitted that the reasonings and findings of the learned Judge is absolutely errorneous. He further submitted that the learned Judge has failed to appreciate that the present case of the appellant is a case of contract between the deceased and the present opponent. He further submitted that the learned Judge has observed in his judgment that there was a contract between the parties but has failed to appreciate that there was a breach of contract by the respondent. He further submitted that the learned Judge ought to have appreciated that instead of Article 72, Article 55 of the Limitation Act 1963 would apply as in the present case as there was a contract and that the said contract is breached. Thus, instead of Article 72 of the Act, Article 55 would apply where the limitation prescribed is three years from the date the contract is alleged to have been breached.

5. Learned advocate for the appellant alternatively submitted that, even in any view of the matter, this is a suit for damages based on the law of tort and general period of limitation namely Article 113 residuary article apply, and if that is so, the suit is filed within three years and, therefore, the same is within the period of limitation and this Court must grant compensation to the plaintiff due to the death of the deceased.

5.1 In order to appreciate the aforesaid contention, learned advocate for the appellants has relied upon Chapter 5 of the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as `the Act') which

provides definition of essential services. He has also relied upon Sec.63 of the Act which provides matter to be provided for by the Corporation. Sec.66 and Sec.66(5) of the Act reads as under:

"Sec.66 Matters which may be provided for by the Corporation at its discretion.

"Sec.66(5) provides swimming pools, public wash houses, bathing places and other institutions designed for the improvement of public health."

Section 487 of the Act reads as under:

"Sec.487 Protection of persons acting under this Act against suits:-

(1) No suit shall be instituted against the Corporation or against the Commissioner, or the Transport Manager, or against any municipal officer or servant, in respect of any act done or purported to be done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act:-

"(a) until the expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief municipal officer and in the case of the Commissioner or of the Transport Manager or of a municipal officer or servant delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney advocate, pleader or agent, if any, for the purpose of such suit, nor

(b) unless it is commenced within six months next after the accrual of the cause of action."

5.2 As regards Limitation Act, he has relied upon Articles 2, 22, 36, 115 & 120 of the Limitation Act, 1908 (Old Limitation Act) which reads as under:

Limitation Act 1908 First Schedule

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| Art.2 For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the being in India. | Ninety days | When the act or omission takes place. |
| Art.22 For compensation for any other injury to the person | One year | When the injury is committed. |
| Art.36 For compensation for any malfeasance, mis-feasance or non-feasance independent of contract and not herein specially provided for. | Two years | When the malfeasance, or non-feasance takes place. |
| "Art.115 For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for. | Three years | When the contract is broken, or (where there are successive breaches when the breach in respect of which the suit is inst- tituted occurs or (where the breach is cont- inuing) when it ceases. |
| Art.120 Suit for which no period of limitation is provided elsewhere in this Schedule | Six years | When the right to sue accrues |

5.3 He has referred this old article only with a view to substantiate his case for some of the Hon'ble Supreme Court judgments which he has relied upon where the Hon'ble Apex Court relied upon those provisions in this behalf.

5.4 As regards Limitation Act, 1963, he has firstly relied upon Article 55, 72, 82 & 113 of the Act which reads as under:

| Article | Period | Time from which period begins to run |
|---|---|---|
| | of | tion | Limita- | |
| Art.55 For compensation for the breach of any contract, express or implied, not herein specially provided for. | Three years | When the contract is broken or (where are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases." |
| Art.72 For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment inforce for the time being in the territories to which this Act extends. | One year | When the act or omission takes place. |
| Art.82 By executors, administrators or representative under the Indian Fatal Accidents Act, 1855 (13 of 1855) | Two years | The date of the death of the person killed. |
| Art.113 Any suit for which no period of limitation is provided elsewhere in this Schedule. | Three years. | When the right to sue accrues. |

5.5 Learned advocate for the appellants Mr.C.J.Vin has relied upon the Full Bench judgment of Lahore High Court consisting of Five Judges reported in AIR (32) 1945 Lahore 324 in the case of MAHOMAD SADAAT ALI KHAN vs. ADMINISTRATOR, CORPORATION OF CITY OF LAHORE. In that case the plaintiff was claiming compensation for damages said to have been caused by the failure of a local body to maintain its water system in proper order. In that case the question arose as to whether the suit is governed by Article 2 or by Article 36 of 1908 of Limitation Act or not. I have already set out Article 2 and 36 of 908 of the Limitation Act where Justice Abdur Rahman on page 329 observed as under:

"I might say in the end that the breach of a duty imposed under a statute is usually the result of negligence, and negligence is a definite act of malfeasance, not merely that of non-feasance. Had the leaking pipe in the present case been repaired in time, the plaintiff would have suffered no damage and the present suit would not have been instituted. If the Municipal Committee did not discharge its functions and was guilty of a breach of duty imposed by the Punjab Municipal Act, it cannot be said to have omitted to do so in pursuance of the Act but in contravention of the Act. This breach would be, in my judgment covered by Art.36, Limitation Act, and not by Art.2. "

5.5(A) Thereafter Justice Mahajan also considered this aspect and on page 332 to 333 and Justice Mahajan has observed as under:

"My learned brother Rahman has fully dealt with them. All I wish to say is that there is no well-considered decision in support of either view which can furnish a guide in solving this problem. In my view, the decisions that applied Art.36 to cases of municipal corporations failing to keept their water mains in good repair laid down sound law on the subject and should be followed. Even if Art.2 had any application to such cases, question would still arise whether in the case of leakage of water from municipal water mains where damage results from the recurrence of that leakage from day to day, the provisions of S.23, Limitation Act, would not bring the suit of a plaintiff in a particular case within limitation."

5.5(B) Other Three Judges, Justice Harries, C.J., Justice Munir and Justice Achhru Ram also concur with the views of both the judges.

5.6 For appreciating the aforesaid controversy, learned advocate for the appellants has firstly relied upon the judgment of the Hon'ble Apex Court in the case of STATE OF PUNJAB vs M/S. MODERN CULTIVATORS reported in AIR 1965 SC 17. In that case the question which was raised before the Hon'ble Supreme Court was that of Western Jamna Canal near Sangipur and Jandhrea villages burst its western bank. The canal water inundated the neighbouring fields where crops of sugarcane, maize, urud

etc. grown by the plaintiff firm were damaged. The plaintiff brought this action alleging that the breach in the bank was caused by negligence on the part of the canal authorities who were guilty of further negligence in not closing the breach without delay. In that case the three Judges of the Hon'ble Supreme Court namely Justice A.K.Sarkar, Justice M.Hidayatullah and Justice J.R.Mudholkar constituted the Bench. All the three Judges delivered a different judgments and separate conclusions. The Hon'ble Apex Court considered the judgment of Lahore High Court AIR 1945 Lah 324. As far as judgement of Mr. Justice Hidayatullah is concerned, in para 16 of the judgement the learned judge has considered the principle regarding tortious liability and in para 18 the court has observed thus:-

"Perhaps the liability is viewed strictly as an inducement to care. Safety is best secured when it is made the responsibility of the person who must not only take precautions to avoid accident but who alone decides what those precuations should be."

The court in para 26 further observed as under:

"These cases have rightly decided that Art. 2 cannot apply to cases where the act or omission complained of is not alleged to be in pursuance of statutory authority."

5.6A Ultimately the Court confirmed the High Court judgment. The Hon'ble Apex Court held that Article 36 which provides for compensation for any malifeasance, misfeasance or non-feasance independent of contract and not herein specially provided for which provides for two years at the relevant time will apply in this case.

5.7 Learned advocate for the appellants further relied upon judgment of the Hon'ble Apex Court in the case of NATIONAL BANK OF LAHORE LTD. vs. SOHAN LAL SAIGAL AND OTHERS reported in AIR 1965 SC 1663. In that case one of the customer of the appellant a National Bank of Lahore Limited and he was carrying it banking business. It carries on the incidental business of hiring out lockers out of cabinets in safe deposit vaults to constituents for safe custody of their jewels and other valuables. In that case Sohanlal respondent before the Supreme Court hired lockers from the bank at Jullundur through its Manager. The said lockers were tampered with and the valuables of the respondents kept therein were removed by the Manager of the Jullundur

branch of the Bank. In that situation the respondent filed a suit for damages. In that case the Hon'ble Court in para 6 on page 1665 has explained the scope of Article 36 as under:

> "The scope of Art. 36 of the First Schedule to the Limitation Act is fairly well settled. The said article says that the period of limitation "for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specifically provided for" is two years from the time when the malfeasance, misfeasance or nonfeasaonce takes place. If this article applied, the suits having been filed more tahn 2 years after the loss of the articles deposited with the Bank, they would be clearly out of time. Article 36 applied to acts or omissions commonly known as torts by English lawyers. They are wrongs independent of contract. Article 36 applies to actions "ex delicto" whereas Art. 115 applies to actions `ex contractu'."

> "These torts are often considered as of three kinds, viz., non-feasance or the omission of some act which a man is by law bound to do, mis-feasance, being the improper performance of some lawful act, or malfeasance, being the commission of some act which is in itself unlawful."

> "But to attract Art.36 these wrongs shall be independent of contract."

Then again on page 1666 at para 8 the Ho'ble Court further observed as under:

> "We, therefore, hold that there were clear allegations in the plaints that the defendant committed breach of the contracts in not complying with some of the conditions thereof and that the defendant understood those allegations in that light and traversed them. The suit claims being ex contractu, were clearly governed by Art.115 of the First Schedule to the Limitation Act and not by Art.36 thereof."

5.7A In that case the Court held that Article 36 will not apply but Article 115 of the Old Limitation Act which provides for compensation for the breach of any contract,

express or implied, not in writing registered and not herein specially provided for will apply. The Court held that Article 36 does not apply in such situation.

5.8 The learned counsel for the appellant has relied on the judgement of the Hon'ble Supreme Court in the case of JAY LAXMI SALT WORKS (P) LTD. VS. THE STATE OF GUJARAT reported in 1994(3) JT 492. In that case a bundh was completed in the year 1955. In the very first monsoon of 1956, due to change of natural course of different streams in the reclaimed area and its diversion towards the appellant's factory which was existing from before led to increased flow and discharge of water on appellant's land and factory. Due to heavy monsoon level in the river rose and filtered to the premises of the factory breaking even the protective bundh made by the appellant on the border of its factory. In this situation the appellant asked for damages first from the Government. The Government constituted a Committee and determined certain damages. Since the amount was not paid, the appellant filed the suit for damages against the State of Gujarat. In that matter the question arose as to whether the damages fall within the realm of law of tort and whether Article 36 of Limitation Act, prior to 1963 applies to such situation?

5.9 In this situation the Hon'ble Supreme Court considered the definition of tort and also English law in this behalf. In para 10 of the judgement the Hon'ble Supreme Court considered what is meant by negligence. The Hon'ble Supreme Court also considered in para 11 of the judgement the decisions in the case of RYLANDS VS. FLETCHER (1868 LR (3) 330) and STATE OF PUNJAB VS. MODERN CULTIVATORS (supra) and what is meant by absolute liability, strict liability and fault liability. The Hon'ble Supreme Court has thereafter observed that `absolute liability', or `strict liability' and `fault liability' do not go together. Thereafter, the Hon'ble Supreme Court considered as to whether Article 36 of the Limitation Act applies or not. The Court also considered the decision in the case of NATIONAL BANK OF LAHORE LTD. VS. SOHAN LAL SAIGAL & OTHERS (supra) and English cases. The Court thereafter has, in para 13 on pages 505-506 held thus:-

"The basic ingredients of torts, namely, injury and damage due to failure to observe duty has been found to have been established. In the conservative sense it was negligence. But in modern sense and present day context it was not only negligence but mistake, defective planning,

failure to discharge public duty. It was thus tort not in the narrow sense but in the broader sense to which Article 120 applied. The suit, therefore, could not be thrown out as it was filed beyond two years from the date the incident took place. The substantial question of law if Article 36 was exhaustive of all torts is thus answered in the negative. Further the rule in RYLANDS VS. FLETCHER (supra) has not been modified by our Court in Modern Cultivators (supra). And the article of Limitation Act applicable to the facts of the case was Article 120 and not Article 36."

5.10 Ultimately the Hon'ble Supreme Court allowed the appeal and granted damages in this behalf.

5.11 He has also relied upon another judgment of the Hon'ble Apex Court in the case of MUNICIPAL CORPORATION OF DELHI vs. SMT.SUSHILA DEVI AND OTHERS reported in AIR 1999 SC 1929. In that case one person died consequent to injury branch of a tree. In that case the person died due to fall of a branch of tree standing on road when he was passing by that road. It was held that the Municipal Corporation was negligent in performing its duty under the common law and, therefore, liable in damages to the claimants for the injury caused to the deceased by fall of the branch of the tree and the consequences flowing therefrom. In that case the Corporation contended that Sec.478 of the Delhi Municipal Corporation Act, 1957 which is pari materia of Sec.487 of the present Act the suit is not maintainable. In that case on behalf of the Corporation submitted that Corporation is an authority governed by the Act and inasmuch as it was sought to be held liable for failure to perform its duty to take care resulting into an accident, it was necessary for the claimants to have served a legal notice of two months' duration under sub-sec.(1) of Sec.478 of the Act and the suit should have been instituted within a period of six months from the date of accrual of cause of action which having not been done, the suit was barred by time. Against that contention, in paras 7 & 14 the Hon'ble Apex Court has observed as under:

"Para.7 The contention has to be rejected forthwith. The bundle of facts constituting the cause of action which has accrued to the claimants are the ownership and possession of the tree vesting in the Corporation, its maintenance by the Corporation, fall of the branch of the tree over the deceased and the death consequent

to the injury sustained. The causa proxima, i.e. the immediate cause of action is the fall of the branch of the tree over the head of the deceased. The fall of the branch of the tree cannot be attributed to any act done or purpoting to have been done in pursuance of the Act etc., by the Municipal Corporation or any officer or employee thereof. The liability has arisen and has been sought to be enforced by the claimants under the law of torts. The finding recorded in the suit and in the Letters Patent Appeal is one of negligence on the part of the Municipal Corporation. To such an action S.478 does not apply at all. The suit filed within a period of two years from the date of accrual of cause of action was governed by Art.82 of the Limitation Act, 1963 and was well within limitation. The plaintiffs' action was founded in tort. The plaintiffs have not rested their case on any statutory duty on the part of the Corporation and failure or negligence in performing such duty."

"Para.14 In our opinion the High Court was right in holding the Municipal Corporation negligent in performing its duty under the common law and, therefore, liable in damages to the plaintiffs for the injury caused to the deceased by fall of the branch of the tree and the consequences flowing therefrom."

5.12 Learned advocate for the appellants has also relied upon the judgment of Andhra Pradesh High Court in the case of CHALLA RAMKONDA REDDY AND OTHERS vs. STATE OF A.P. reported in AIR 1989 AP 235. In that case the Division Bench (Coram: Jeevan Reddy (as he was then) & Bhaskar Rao, JJ.) of Andhra Pradesh High Court was concerned with the injury and death of a person who are in a jail. In that case the police arrested persons in course of investigation of a crime and on remand to judicial custody, they were put in a sub-jail. Some miscreants entered the jail during night and hurled bombs at them. One of them died and another was seriously injured. The evidence indicated failure and negligence on the part of the police in guarding the prison properly as required under the prescribed rules. The legal representatives of the deceased filed a suit in Civil Court for compensation against the State. In that case also one of the defence of the State was that as there is a violation of Rule 48 of the Madras Jail Rules and tried to relied upon Article 72 of the Limitation Act contending that the suit of the plaintiff is not

maintainable. In that case the Court considered Article 2 of the Old Limitation Act, the Full Bench judgment of the Lahore High Court in the case of Mohd.Sadaat Ali v. Lahore Corporation reported in AIR 1945 Lah 324, also considered Article 72 of the New Limitation Act and also considered the case of State of Punjab's case (supra) and observed in para 12 on page 242 and 243 as under:

"Para.12 .... In short, in the present case, the omission to do an act could not have been made under colour of a statutory power, nor could such an omission be in the honest belief that the omission was justified by the statute..". In short, the approach of Mahajan, J. was that while omitting to do an act, the officer or authority must honestly believe that he was omitting to do that act in pursuance of a statute. This decision has been approved by the Supreme Court in State of Punjab v. Modern Cultivators, AIR 1965 SC 75. Applying the test aforesaid, it must be held that the failure or negligence on the part of the police in safeguarding the prisoners is not an omission in pursuance of an enactment, namely, R.48 of the Madras Rules. As stated above, R.48 obliges the police to safeguard the prisoners while in their custody, and makes them statutorily responsible for the safe-custody of the prisoners. It cannot be said that while failing to properly guard the jail officials were honestly believing that they were failing to do so in pursuance of an enactment. We are, therefore, of the opinion that Art.72 has not application. The only other Article which is attracted is the residuary Article in Art.113 - and it is admitted that the suit is within limitation if Art.113 is applied."

5.13 Being aggrieved and dissatisfied with the aforesaid judgment, the State filed appeal before the Hon'ble Apex Court and before the Hon'ble Apex Court also in the case of State of Andhra Pradesh vs. Challa Ramkrishna Reddy and others reported in AIR 2000 SC 2083, the Hon'ble Apex Court has considered Article 72 of the New Limitation Act, Article 2 of the Old Limitation Act, Article 113 of the New Limitation Act. The Apex Court also considered judgment of High Court under appeal and in para 15 and 16 the Court observed as under:

"Para.15 It would thus be seen from the above that the deceased as also Challa Ramkrishna Reddy who apprehended danger to their lives, complained

to the police and requested for adequate police guards being deployed at the jail, but their requests were not heeded to and true to their apprehension, a bomb was thrown at them which caused the death of Challa Chinnappa Reddy and injuries to Challa Ramkrishna Reddy (P.W.1). In this process, one of the three persons, who was sleeping near the jail, was also killed. The Police Sub-Inspector was also in conspiracy and it was for this reason that in spite of their requests, adequate security guards were not provided and only two Constables, instead of nine, were put on duty. Since the Sub-Inspector of Police himself was in conspiracy, the act in not providing adequate security at the jail cannot be treated to be an act or omission in pursuance of a statutory duty, namely. Rule 48 of the Madras Prison Rules, referred to by the High Court. Moreover, the action was wholly malafide and, therefore, there was no question of the provisions of Article 72 being invoked to defeat the claim of the respondents as the protection of shorter period of limitation, contemplated by that Article, is available only in respect of bona fide acts."

"Para.16 In our opinion, the High Court in the circumstances of this case, was justified in not applying the provisions of Article 72 and invoking the provisions of Article 113 (the residuary Article) to hold that the suit was within limitation."

5.14 Relying on all these decisions, the learned counsel for the appellants submitted that this is a case where the plaintiffs are claiming damages purely in realm of tort and no duty as contemplated under the provisions of the Corporation Act, Rules and Regulations, applies in this behalf. He therefore submitted that in view of the judgement of the Hon'ble Supreme Court in the case of MUNICIPAL CORPORATION OF DELHI VS. SMT. SUSHILA DEVI AND OTHERS (supra), the finding of the learned judge that Section 487 of the B.P.M.C. may apply and therefore the suit may become barred by limitation is not a correct finding of fact and the same is contrary and inconsistent with the ratio of the Hon'ble Supreme court in the case of SMT. SUSHILA DEVI AND OTEHRS (supra) and therefore the claim of the plaintiffs for damages cannot be considered in light of Section 487 of the B.P.M.C. Act. Alternatively, the learned counsel for the appellant submitted that this is purely a law of tort and therefore

residuary Article 113 of the New Limitation Act applies. In support of the same he has relied on the judgement of the Andhra Pradesh High Court in the case of CHALLA RAMKONDA REDDY AND OTHERS VS. STATE OF A.P. BY DISTRICT COLLECTOR, KURNOOL reported AIR 1989 A.P. 235 and also STATE OF ANDHRA PRADESH VS. CHALLA RAMKRISHNA REDDY AND OTHERS (supra) where the Hon'ble Supreme Court has considered the scope of Article 113 of the New Limitation Act.

5.15 The learned counsel for the appellant therefore submitted that in the present case all the ingredients of law of torts are fulfilled and therefore Article 113 applies.

6. On behalf of the Corporation, Mr.Munshaw, learned advocate submitted that he has tried to support the reasonings of the learned Judge in this behalf. He submitted that in view of Sec.487 of the Act, as the incident took place on 12.2.84 and the statutory notice have been given on 16.2.85 (Ex.37) and the present suit filed on 21.8.86, the suit is clearly time barred. In alternatively, he further submitted that, even if sec.487 of the Act is not applicable then in view of Article 72 of the Limitation Act 1963 (New Act) also applies in this case. The plaintiff has claimed compensation for doing of or omitting to do the alleged act etc. has to be brought within the period of one year of such act or omissions. Pursuance to the enactment act enforced at the time of accident only one year applies when the act or omission takes place. He submitted that plaintiff has alleged negligence on the officers of the Municipal Corporation pursuant to the duty of the Corporation Act and therefore Article 72 clearly applies. He further submitted that all the aforesaid authorities cited by the learned advocate for the appellants are not applicable in the facts of the case. He submitted that Article 55 is not applicable to the case suit relating to the contract and here there is no breach of contract and, therefore, Article 55 is not applicable in this case. He has further submitted that even Article 82 will also not apply in this case because this is not the case of executory or administrator under the Indian Fatal Act. He submitted that once according to corporation Article 72 applies there is no question of Article 113 of the New Limitation Act applies and, therefore, suit is clearly time barred.

MY CONCLUSIONS:

7. I have considered the facts of this case, finding of the learned judge and also the law governing the

principle of limitation, old provisions as well as new provisions. I have also considered the judgement of the Hon'ble Apex Court. I have also considered the judgement of the Full Bench judgement of Lahore High Court in the case of MAHOMAD SADAAT ALI KHAN VS. ADMINISTRATOR, CORPORATION OF CITY OF LAHORE reported in AIR 1945 Lahore 324, judgement of the Hon'ble Supreme Court in the case of Municipal Corporation of Delhi Vs. Smt. Sushila Devi and others (supra), judgement of the Andhra Pradesh High Court in the case of Challa Ramkonda Reddy and others Vs. State of A.P. (supra) as well as the decision of the Hon'ble Supreme Court in the case of State of Andhra Pradesh Vs. Challa Ramkrishna Reddy and others (supra). In this case as per the finding of the learned judge the plaintiffs have been able to prove that the deceased Jayeshbhai received injuries resulting in death while taking bath in the swimming pool on account of negligence of the defendant in maintaining the swimming pool and therefore the plaintiffs are entitled to compensation. Against the finding of the learned judge, the Corporation has not filed appeal and therefore the said finding is binding on the Corporation. Therefore, I am not discussing this aspect in my judgement. In view of the same, the only questions which are to be considered by me in this appeal are as to whether the officers of the Corporation failed in its statutory duty or the act of Corporation falls within the realm of Law of Torts, whether the suit is barred either by the provision of Section 487 of the B.P.M.C. Act or whether the suit is barred by Article 72 of the Limitation Act of 1963 as held by the learned judge.

8. What is tort and what is tortious liability:-

The General Law of Tort

8.1 "1201. Rights of action in tort: Those civil rights of action which are available for the recovery of unliquidated damages by persons who have sustained injury or loss from acts, statements or omissions of others in breach of duty or contravention of right imposed or conferred by law rather than by agreement are rights of action in tort. The proposition thus formulated shows that the nature of tort can, perhaps, best be approached by way of distinctions. The principal distinctions to be drawn are the distinction between an action in tort and an action in contract, and the distinction between a civil wrong and a crime, although the same circumstances may give rise to

actions for breach of contract or in tort and although many tortious acts are also crimes.

"1202. The domains of the law of tort: The scope of the rights to relief made available by English law constitutes what has been termed the province of the law of tort. The historical origins of English jurisprudence and the consequential importance which was formerly attached to particular forms of action have led to the division of this province into distinct domains, for example trespass, nuisance and negligence, so that some jurists have preferred to consider this branch of the law as a body of rules establishing specific injuries and unconnected by any general principle of liability. However, whichever of these alternative analyses is preferred it seems indisputable that from time to time in the past the common law has recognised new duties and liabilities and has the capacity to do so in the future, although a cause of action must be found either on principle or authority if it is to be upheld."

[ Re: Halsbury's Laws of England Fourth Edition Volume 45 ] ( page 558, 559) (para 1201, 1202)

8.3 "Damages essential mark of tort: Although a tort is a civil injury, not all civil injuries are torts, for no civil injury is to be classed as a tort unless the appropriate remedy for it is an action for damages. Such an action is an essential characteristic of every true tort."

[ Re: Salmond & Heuston on the Law of Torts, Twentieth Edition, First Indian Reprint 1993 Edited by R.F.V.Heuston and R.A.Buckley, Page 9 Chapter 2 General Principles of Liability ]

"Definition of tortious liability :-

8.4 Winfield's definition of tort was as follows:-

Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages."

[Re. Winfield & Jolowicz on Law of Tort, Fifteenth Edition by W.H.Rogers, page 4]

"Constituents of Tort :

8.5 The law of torts is fashioned as "an instrument for making people adhere to standards of a reasonable behaviour and respect the rights and interests of one another. This it does by protecting interests and by providing for situations when a person whose protected interest is violated can recover compensation for the loss suffered by him from the person who has violated the same."

General Principle of Liability :-

8.6 "There are two views prevailing on the subject of existence of some broad unifying principle of all tortious liability. The two views are set out in the question that SALMOND asked: "Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number specific rules prohibiting certain kinds of harmful activity and leaving all the residue outside the sphere of legal responsibility". SALMOND preferred the second alternative and his book for this reason is still entitled as Law of Torts and not Law of Tort. WINFIELD on the other hand accepted the second alternative i.e. the narrow view only from the practical point of view as a day to day matter but he contended that "from a broader outlook there was validity in the theory of a fundamental general principle of liability, for if we take the view, as we must, that the law of tort has grown for centuries, and is still growing, then some such principle seems to be at the back of it". The entire history of the development of the tort law shows a continuous tendency, which is naturally not uniform in all common law countries, to recognise as worthy of legal protection of interests which were previously not protected at all or were infrequently protected and it is unlikely that this tendency has ceased or is going to cease in future. There are dicta both ancient and modern that categories of tort are not closed and that novelty of a claim is no defence. But generally, the judicial process leading to recognition of new tort situations is slow and concealed for judges are cautious in making innovations and they seldom proclaim their

creative role. Normally a new principle is judicially accepted to accommodate new ideas of social welfare or public policy only after they have gained their recognition in the society for example in extra-judicial writings and even then the decision accepting the new principle is supported mainly by expansion or restriction of existing principles which "gradually receive a new content and at last a new form."

[ Re: The Law of Torts, Ratanlal & Dhirajlal, 23rd Edition 1997 Edited by Justice G.P.Singh Page 21 General Principle of Liability]

9 I have considered the facts and circumstances of the case and the decisions cited before me. I have also considered what is tort and tortious liability from Halsbury's Laws of England, Salmond on the Law of Torts, Winfield & Jolowicz on Tort and also Ratanlal & Dhirajlal on Law of Trots by G.P. Singh. It is no doubt true that in this case swimming pool has been maintained by the Corporation under discretionary duty provided under Section 66 of the B.P.M.C. Act. However, there is no statutory duty defined under the provisions of the Act, Rules or Regulations of the coach towards the person who is swimming. In view of the same, therefore, an act or omission of a coach by which the plaintiffs' son could not be saved from drowning, the same does not fall within the breach of duty provided under the provisions of the B.P.M.C. Act. The Corporation through its servant coach has failed in discharging of its duty of care against the persons who are swimming, the case falls squarely within the tortious liability and thereby there is tortious liability of the Corporation in this behalf.

Limitation:

10. Once I hold that the Corporation's servants are liable under tortious action, the next question is whether the suit filed by the plaintiffs is within the period of limitation. In this case I have to consider Section 487 of the B.P.M.C. Act. According to the Corporation in this case the incident has happened on 12.2.1984. Statutory notice was served on 16.2.1985 and the suit has been filed on 21.8.1986 and therefore in view of Section 487 of the B.P.M.C. Act whether the suit is barred by section 487 of the B.P.M.C. Act or not? Prima facie submission of Mr. Munshaw that the suit is barred by provisions of Section 487 of the B.P.M.C. Act is attractive but not acceptable in view of the judgement

of the Hon'ble Supreme Court in the case of MUNICIPAL CORPORATION OF DELHI VS. SMT. SUSHILA DEVI AND OTHERS (supra) where in identical situation the Hon'ble Supreme Court has held in similar circumstances identical Section of Delhi Municipal Corporation Act is not applicable when the damage is to be claimed under general law of tort. In my view therefore, the submission of Mr. Munshaw that Section 487 of the B.P.M.C. Act is applicable is liable to be rejected and the suit cannot be barred under Section 487 of the Act in the present matter.

10.1 The next question which is to be considered is whether Article 72 of the Limitation Act of 1963 applies or not. Article 72 corresponded to old Article 2. There is a formal change in the language in the first column. The period of limitation has been enhanced to one year. This article is of a general character and would apply to those cases for which come under it and for which there is no other special provision in other articles of the Limitation Act. Article 72 is directed to afford protection persons acting in pursuance of an enactment, against State claims and against consequences of committing illegal acts intended to be done under the authority of any law which by reason of some mistake or misapprehension are not justified or are not defendable by its provisions. The protect under Art.72 can, therefore, be claimed only when the act has been performed under colour of statutory duty. Article 72 applies only if an act is alleged to be done in pursuance of any enactment in force at the time of the doing of the act. It may be noted that the learned Judge in his judgment has observed that in this case the suit is barred by Article 72 of the Act because the action for compensation for doing of or for omitting to do the alleged act has to be brought within the period of one year of such act or omission and the suit has been brought after a period of two years six months and nine days after the alleged omission on the part of the defendant. The learned Judge has held that in this case the incident happened on 12.2.1984 and suit has been filed on 21.8.1986 and therefore the same is barred by period of limitation in view of the Article 72 of the Act.

10.2 I have considered what is meant by tort and what is meant by tortious liability in this behalf. In my view the coach failed and neglect to perform his duty which was not the statutory duty or not a colour of office not pursuant to any enactment i.e. provisions of the act, rules or regulations and, therefore, Article 72 of the Act will not apply in this case. I have come to

the aforesaid conclusions after considering the Division Bench judgment of Andhra Pradesh High Court in the case of CHALLA RAMKONDA REDDY AND OTHERS VS. STATE OF A.P. (supra) and also the judgement of the Hon'ble Supreme Court in the case of STATE OF ANDHRA PRADESH VS. CHALLA RAMKRISHNA REDDY AND OTHERS (supra) where the Hon'ble Supreme Court has held that in this case the act or omission falls within the general law of tort and therefore after referring to Article 72 of the Limitation Act (New Act) the Hon'ble Supreme Court held that if the damages falls in general law of tort Article 72 will not apply but residuary Article 113 of the Act will apply. In this case as I have held that damage of the deceased falls within the general law of tort and in view of the same Article 72 will not apply but Article 113 of the Limitation Act will apply.

10.2(A) In this case the principle enunciated in the case of Mahomad Sadaat Ali Khan (supra) Full Bench judgment of Lahore High Court which I have referred is squarely applies in this case. In view of these discussions once I hold that Article 72 will not apply in this case where the act or omission is not alleged to be in pursuance of the statutory duty then in view of the judgment of the Supreme Court there is no other corresponding article in the act for claiming damages in general law of tort and thus the suit will be governed by residuary Article 113 of the Limitation Act.

10.2(B) Learned advocate for the appellants had faintly submitted in the beginning of his argument that Article 55 may apply in this case, however, in view of subsequent decision which has been relied upon by him, he did not adhere to the said argument in this behalf. However, in my view, Article 55 applies when suit is based on breach of contract, the direct article that applies Article 55 and not any other. This article governs every claim for compensation for breach of contract not specifically provided for in the Limitation Act. However, in this case there is no contract entered into by the deceased with the Corporation and, therefore, obviously the Article 55 will not apply in this case.

10.2(C) Article 113 of the Limitation Act. This Article corresponds to Old Article 120. The period of limitation of six years has been reduced to three years. The other particulars under the two corresponding articles, old and new remain unchanged. It may be mentioned here that this residuary article embraces the old Articles 22 and 36 also. This article is the combined reproduction of the residuary Articles 22, 36 and 120 of the repealed

Limitation Act, 1908. Article 22 of the repealed Limitation Act provided the period of one year for the suits for compensation for any other injury, which was not specifically provided for in the Limitation Act, 1908, and the period of one year was to commence when the injury complained of was committed. Article 36 of the repealed Limitation Act was another residuary article, which embraced, within its ambit, suits for compensation for misfeasance, malfeasance or non-feasance, independent of contract, for which there was no specific provision in the Limitation Act, 1908. The period prescribed was two years which was to commence from the date when the misfeasance, malfeasance or non-feasance took place. Article 120 was the general residuary article, which covered the area, which was left uncovered by the provisions of the repealed Limitation Act. The period prescribed was six years which commenced on the date when the right to sue accrued. The present Article 113 covers all the uncovered grounds. Article 113 being the residuary article applies only if the suit does not come within the purview of any other article in the Limitation Act. Article 113 of the Act prescribes that it will govern all those suits for which there is no prescribed period of limitation in this Act; the period prescribed is three years which is to commence from the date when the right to sue accrues.

10.3 In view of my aforesaid observations in this case the incident happened on 12.2.1984 and suit has been filed on 21.8.1986 and therefore the suit is filed within the period of limitation. In view of the same, appeal filed by the present appellants is allowed with costs and suit is held to be maintainable.

11. In view of the above, the judgement and decree passed by the learned judge on 29.10.1999 dismissing the suit of the plaintiff is hereby quashed and set aside. The defendant Municipal Corporation is directed to pay to the appellants Rs. 80,000/- (Rupees eighty thousand) in all with 9% interest per annum from the date of the suit in this behalf within three months from the date of the order. If the defendant is not paying the said amount within three months from the date of the order, the defendant Municipal Corporation is liable to pay interest at the rate of 11% per annum from the date of the suit in this behalf.

(K.M. Mehta, J.)

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